No. 2926

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CHEW HOY QUONG,

Appellant,

vs.

EDWARD WHITE, as Commissioner of Immigration at the Port of San Francisco, California,

Appellee.

In the Matter of the Application of Chew Hoy Quong, for a Writ of Habeas Corpus for and on behalf of his wife, Quok Shee.

BRIEF FOR APPELLANT.

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Attorneys for Appellant.

Filed this.....day of May, 1917.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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Statement of the Case.

This is an appeal from an order of the District Court of the United States in and for the Northern District of California, sustaining a demurrer to a writ of habeas corpus and denying said petition (Transcript, p. 15).

In the year 1881, Chew Hoy Quong, your petitioner, came to the United States and was duly

admitted to this country. Immediately upon his arrival he became associated with his uncle in a general merchandise establishment at San Francisco. A few years after his arrival his uncle died, leaving him in the entire control of the business. He assumed and carried on this concern up to the year 1906, when the earthquake and fire devastated the establishment. Shortly after the fire he repaired to Holt Station where he organized a company and continued in that concern for several years. He later became associated with the Chinese Herb Co. in San Francisco known as Dr. Wong Him Herb Co. and still maintains and has now an interest in this last named concern.

On May 15, 1915, Chew Hoy Quong made a trip to China and on February 21, 1916, married Quok Shee at Hong Kong, China. The ceremony was performed according to the new Chinese custom and the two parties lived together as husband and wife in Hong Kong from February 21, 1916, until some time in August, 1916, when they sailed for the United States. They arrived at the Immigration Station at Angel Island September 1, 1916.

Without further trouble Chew Hoy Quong was permitted to land on the theory of his being a returning merchant, having supplied himself with Form 431 before his departure. There is absolutely no question as to his status as a merchant. His wife, Quok Shee, has not been permitted to land and is still held in custody at the Immigration Station.

A thorough, complete and searching examination was held shortly after their arrival from China by Inspector J. B. Warner who, on September 5, 1916, reported favorable on the landing of your petitioner's wife. Later, and for reasons that do not appear in the record, a rehearing of the entire matter was held before the Law Section for the Immigration Bureau, Mr. Wilkinson conducting the hearing. On September 15, 1916, Mr. Wilkinson reported as to the proposed landing unfavorable, and on the same day Commissioner White made his finding excluding Quok Shee on the ground that the relationship of husband and wife was not established to his satisfaction. The then attorneys of record for Quok Shee appealed to the Secretary of Labor where the finding of Commissioner White was approved and an order of exclusion made.

We then petitioned for a writ of habeas corpus which was denied and this appeal was duly taken.

When the order to show cause why the writ should not issue was heard, respondent filed in open court the original records of the Department of Immigration and by stipulation of counsel and order of court said original records were to be considered a part of the petition (Transcript, pp. 11-12).

It was later stipulated and the District Court so ordered that these records be transferred to this court for consideration without being transcribed

(Transcript, pp. 24-25). References herein to said records will be noted as follows (Record, p.....).

Argument.

Our argument for the issuance of the writ may be divided under three heads:

1. That the Commissioner was either (a) without power to order a rehearing of the application, on his own motion, after at a full and fair hearing applicant had established her right to enter and the examining inspector had made his favorable report thereon; or, (b) under the circumstances of this case such order constituted a manifest abuse of discretion.

2. That a full and fair hearing was not given the applicant on the re-examination of the husband and wife.

3. That the finding of the Commissioner totally disregarded the evidence and was not based on the failure to prove the relationship but was grounded upon a mere inference, suspicion or conjecture that the applicant was being imported for an immoral purpose.

I.

(a) In regard to our first contention the record discloses that on September 5, 1916, a hearing on the application of the detained was held before In-

spector J. B. Warner. The applicant and her husband were both examined and the husband recalled. This testimony appears on pages 2 to 10, Exhibit "A" of the Record. This hearing reveals that the testimony of each witness co-ordinated to the minutest detail and not one single discrepancy or even alleged discrepancy existed. The examining inspector's report was favorable and recommended admission (Record, p. 10).

There was not one contradiction nor was there a single statement made by either party that could in any way discredit their testimony. It is apparent by a reading of the record that the testimony adduced at the first hearing established the marriage relation beyond the question of a doubt.

Commissioner White arbitrarily and *without any cause whatsoever* ordered the applicants to reappear for another examination (Record, p. 11).

We contend that the commissioner exceeded his authority in ordering this rehearing and that under the statutes and rules of immigration there is no such power given.

In the first place should such conduct be held allowable where there is no substantial evidence in support thereof, it would empower the commissioner to order and re-order examinations of applicants *ad infinitum* until by industry of severe cross-questioning seeming irregularities could be elicited to sustain an order of deportation. If such power is held to reside in the commissioner it would mean

that he is empowered to postpone indefinitely any landing he may desire without regard to human liberty and human rights. It means that on mere suspicion he may disregard the evidence and proved facts and set about to entangle an applicant in the snares of a merciless examination. We do not contend that where other witnesses are to be heard, or discrepancies to be explained, or where there is substantial evidence to support it, that the commissioner has not such power; it is only when such order is *arbitrarily* made without *any ground or reason* whatsoever after a full and fair hearing that we insist the commissioner acts in excess of his authority.

> "The general rule is that uncontradicted evidence free from inherent improbability * * * and in no way discredited is conclusive."
>
> "Even the statements of a Chinaman, himself, who is seeking admission to this country, when uncontradicted by anything in the case and when not incredible on its face was affirmative proof of lawful right to remain."
>
> "A commissioner may not arbitrarily, capriciously or against reasonable unimpeached and credible evidence which is not contradicted in its material points and susceptible of but one fair construction refuse to be satisfied. * * * "
>
> Vol. 2, Corpus Juris, pp. 1103-1104;
>
> Moy Gue Lum v. United States, 211 Fed. 91;
>
> Lim Sam v. U. S., 189 Fed. 534.

(b) But if it be held that such action on his part is not enjoined by law, then we contend that it is a clear abuse of discretion.

First, because it ignores the "indisputable character of the evidence", and, second, because it shows a spirit hostile to both the law and the applicant alike.

As to the first proposition it has been pointed out that a full and fair hearing was conducted in the first instance. The examination was not only complete but exhaustive. The co-ordination of the testimony of both husband and wife was of such a character as to *conclusively* establish the relationship. To say that it did not (which the order for rehearing in effect says) is to ignore the "indisputable character of the evidence".

In Whitfield v. Hanges, 222 Fed. 745, this court held:

> "Administrative findings and orders quasi judicial in character are void if there was no *substantial evidence* to support them or if they are contrary to the 'indisputable character of the evidence'."
>
> *Citing* School of Magnetic Healing v. McAnnulty, 187 U. S. 94 et seq.

That case further holds that whether or not there was any substantial evidence is a *question of law,* the power and duty to determine which is vested in the courts.

It is held in the following cases that the courts will not ordinarily review the evidence in this class of cases, "but we may consider the *question of law* whether there was evidence to sustain the conclusion" of the immigration official.

> Ong Chew Lung v. Burnett, 232 Fed. 853;
> Chan Kam v. U. S., 232 Fed. 855.

Again, where such a clear right to admission is made out as was in the hearing of September 5th such an arbitrary and unwarranted order made without giving any rhyme or reason therefor is clearly indicative of a hostile spirit toward the case.

In Ex parte Lee Dung Moo, 230 Fed. 746, and Ex parte Tom Toy Tin, 230 Fed. 747, it was held that a spirit hostile to either the law or applicant constituted an *unfair hearing* and denial of due process of law.

We submit therefore that the order for a rehearing, after a full, fair and complete examination and proof of relationship and after the examining inspector had recommended admission constituted either an act in excess of authority or a manifest abuse of discretion.

THAT A FULL AND FAIR HEARING WAS NOT GIVEN THE APPLICANT ON THE RE-EXAMINATION OF SEPTEMBER 15, 1916.

Among the grounds the excluding order, of both the commissioner and the Secretary of Labor, was based upon certain alleged discrepancies existing in the testimony of the husband and wife (Record p. 26, and Record p. 62).

This court cannot weigh the sufficiency of the evidence, it is true, but it can and *must* examine that evidence to ascertain whether or not it was contradicted or really discredited in order to justify

deportation, or if there is some evidence to support the finding (118 Fed. 442).

The court must further examine it to see whether or not a *full and fair hearing* was had, and it may also be examined to ascertain whether or not the finding was clearly against the weight of evidence.

U. S. v. Chung Fung Sun, 63 Fed. 261;
Whitfield v. Hanges, 222 Fed. 745.

Our contention as to these alleged discrepancies is that the witnesses were not given a *full and fair* hearing or examination on the facts claimed to be contradicted. A seeming conflict was elicited and then the examination ceased without *offer or opportunity* of explanation.

This court can take judicial notice of the fact that it is a simple matter for a clever interrogator to tangle a witness so that seeming discrepancies and inconsistencies appear in his testimony and in ordinary actions it is usually the function of opposing counsel on redirect to clear these matters. However, under these "star chamber" proceedings (as designated by Justice Brewer) no counsel is allowed to be present to defend his client from the snares of the rigid examination, and it must be the province of this court to carefully examine the completeness of the examination where it touches the facts which constitute the alleged discrepancies.

Since neither witness knows how full an answer was given by the other the court should see that the *same* question is propounded to each, or that a

set of questions is given which will elicit a full answer on the facts. If this is done and the answers are contradictory a *bona fide* discrepancy is obtained. Otherwise there may exist an *apparent* discrepancy which could be easily cleared had the questions been so framed as to elicit the entire truth. In other words a *part* of the truth may often appear to contradict the whole truth. No better example of this can be cited than one appearing in this very case upon the first hearing.

The husband testified as follows:

> "Q. Did you ever visit your home village after you married this woman?
> A. Yes. I went home once" (Record, p. 8).

The wife testified as follows:

> "Q. Tell us exactly how many times your husband was away from home over night after you married him the 19th of the 1st month, this year.
> A. I don't remember how many times—a number of times.
> Q. Did he tell you he was going to his home village each time?
> A. Yes.
> Q. Did he go more than once?
> A. A number of times. I don't remember how many times—more than two times."

The husband was then recalled and testified as follows (Record, Exhibit "A", p. 3):

> "Q. I want to know how many times you visited your village after your marriage.
> A. Only once.
> Q. Are you positive of that?
> A. I am positive I only made one trip."

Had the inspector stopped at this point respondent would have had a discrepancy upon which to rely far stronger than any which he now points out and had he so ceased his examination at this point appellant would have been before this court urging the selfsame contention that he now urges against the other so-called discrepancies, viz., that the *examination on the fact is not full and fair* and no offer or opportunity is made to explain the facts fully or to arrive at the whole truth.

Inspector Warner, however, reverted to the questions (Record, p. 3):

> "Q. Were you away from your village at any other time?
> A. No.
> Q. Are you positive of that?
> A. I was in Macao; a friend of mine invited me to a celebration there for 2 days, on 2 different occasions."

Hence a seeming discrepancy between the testimony of the husband and wife is instantly cleared by a single question calculated to get at the entire truth.

In Ching Loy You, 223 Fed. 833, the court said:

> "The refusal to permit an alien representation by counsel, places upon the immigration officers the *burden* of showing the fairness of the proceeding. There must be an honest effort to establish the truth.
>
> The essential thing is that *there shall have been an honest effort to arrive at the truth* by methods sufficiently fair and reasonable to amount to due process of law."

Now a most casual examination of the testimony adduced at the re-examination of the husband and wife (Record, pp. 9 to 23), and glance at the discrepancies on which the excluding order partly was based (Record, p. 62) will disclose that the second examining inspector, Wilkinson, did not give a full and fair hearing on the facts upon which respondent alleges inconsistencies and an honest effort to arrive at the whole truth is not disclosed by this re-examination.

There are seven alleged discrepancies (Record, p. 62 and p. 26). The first is no discrepancy at all and has heretofore been treated, namely as to the number of times the husband went to his home village. The other six are fully explained in the husband's affidavit (Record, pp. 37-8-9) and the alleged discrepancies are so patently reconcilable that it would avail nothing to encumber this brief with an explanation thereof. After reading the husband's explanation in his affidavit and then reverting to the examination (Record, pp. 9 to 23) it will be entirely manifest that Inspector Wilkinson did not give a full and fair examination on the facts upon which the finding is in a measure based.

Aside from these minor matters, of which respondent makes a mountain, no mention is made by him of the wonderful co-ordination of facts testified to by the husband and wife even down to the most insignificant detail. Especially is this

true of the wedding ceremony, the go-betweens, the preliminary proceedings and the feast itself.

It is only by a survey, with the proper perspective of the whole field of testimony, giving to each statement its bearing on the whole that one can arrive at the real truth. It is in fact extraordinary that from the severe examination to which applicant and her husband were subjected more glaring defects were not brought to light.

Where great weight is placed on the testimony in regard to the clock, page after page of testimony as to all the other household furnishings is totally ignored.

However this touches upon the weight of evidence and we do not ask the court to weigh it. We rest this point on the contention that a *full* and *fair* examination was not given on the facts alleged to be contradictory and that the questioning of the re-examining inspector does not show a real effort to arrive at the whole truth.

The discrepancies in the case are trivial, natural mistakes that any two honorable persons may fall into and the evidence adduced has not that mathematical certainty about it that would create suspicion and designate the case as memorized.

III.

THAT THE FINDING OF THE COMMISSIONER TOTALLY DISREGARDED THE EVIDENCE AND WAS NOT BASED ON A FAILURE TO PROVE THE RELATIONSHIP BUT ON A MERE SUSPICION THAT THE APPLICANT WAS BEING IMPORTED FOR AN IMMORAL PURPOSE.

The first act on the part of the department which strongly indicates the above proposition was the arbitrary order for a rehearing after a complete and exhaustive examination had been had, at which not one single discrepancy was adduced and upon which Inspector Warner reported favorably. Why then did the commissioner order a rehearing? Such proceeding will strike the court as unusual as it is in reality. The only open inference suggested by this unusual course is, that suspicion had been cast upon the applicant from some outside source. Let us therefore examine the record to ascertain whether such inference is therein sustained.

On page 62 of the Record the memorandum for the assistant secretary contains the following:

> "* * * 4. SUBSTANCE OF RECORD FAVORABLE TO CASE: Parts of testimony of applicant and alleged husband in harmony. Possibility of relationship shown.
>
> 5. SUBSTANCE OF RECORD ADVERSE TO THE CASE: Discrepancies between testimony of applicant and that of alleged husband. *Improbability of relationship because of unsuitability of ages of contracting parties.*"

Equally with the discrepancies the *conjecture* as to ages is given as a reason adverse to the case!

After a short recital of the facts the very first paragraph of the memorandum contains the following:

> "It is worthy of note that the alleged husband of the applicant although 56 years of age was never before married until last year which event occurred shortly after his return to China. This omission or postponement on his part of compliance with the ancient and established usages and customs of Chinese until so late in life *lends suspicion as to the relationship.* Another *damaging* factor is the unsuitability of ages found in this case. Chinese customs frown upon the marriage of old men and young girls. In addition to the foregoing *suspicious* circumstances there appear the following discrepancies in the testimony of the applicant and alleged husband. * * *"

Here follow the discrepancies which have been heretofore referred to.

The supplementary memorandum for the assistant secretary contains the following (Record, p. 63):

> "While this is a closer case than Mah Shee, submitted simultaneously, the Bureau is of the opinion that the appeal should not be sustained. The discrepancies pointed out in its previous memorandum *if taken individually do not amount to much.* If taken collectively, however, they amount to considerable and create such a doubt that the Bureau is unable to hold that the applicant has successfully carried the burden upon her by law to make an affirmative and satisfactory showing.
>
> The above is a supplemental discussion of the case purely and simply as a matter of evidence. The following should be said in a general way.

> The Bureau's experience with the landing of young Chinese women brought over as the 'wives' of old Chinese men has not been such as to give it much confidence in this class of cases. Several very recent experiences have emphasized the fact that girls so brought over may be of the highest respectability and yet be imported with the intention to sell them for immoral purposes or to turn them over to some person, not entitled himself to bring a wife.
>
> The Bureau again recommends that the decision of the commissioner at San Francisco be affirmed.
>
> ALFRED HAMPTON,
> Acting Commissioner General.
>
> Approved
> LOUIS F. POST,
> Assistant Secretary."

A similar statement is made by the 2nd examining inspector at Angel Island in his memorandum for the commissioner (Record, p. 26).

From the foregoing excerpts it becomes quite evident that the excluding order was not based upon the evidence. Indeed the department officials are apparently convinced that the applicant was married to her husband. Such phrases as "probability of relationship shown" and "the discrepancies taken singly do not amount too much" and the favorable report of Inspector Warner betray their real conviction, while the long dissertations on the unsuitability of ages, the experience of the Bureau and the suspicion of immoral purposes betray the real reason for exclusion.

But under the Que Lim case, 176 U. S. 459, the wife of a merchant is entitled to enter as such and, her relationship once established, she cannot be excluded upon mere suspicion and conjecture.

In re Ong Chew Hung v. Burnett, 232 Fed. 853, the court held, speaking through Circuit Judge Gilbert:

> "It is not our function to weigh the evidence in this class of cases; but we may consider the question of law whether there was evidence to sustain the conclusion that appellant, when he first came, fraudulently entered the United States. *We find the conclusion rests upon conjecture and suspicion and not upon the evidence.* In the absence of substantial evidence to sustain the same, an order of deportation is arbitrary and unfair and subject to judicial review."

Judge Morrow in the case of Chan Kam v. U. S., adopts that portion of Judge Gilbert's opinion above quoted.

U. S. v. Howe, 235 Fed. 990.

In the last cited case, U. S. v. Howe, Hilda Ross Cavanaugh sought admission into this country from Great Britain. Two grounds were urged for deporting her—first, that of immoral character, since abandoned; second, that she might become a public charge and upon this latter ground she was ordered deported. Writ of habeas corpus applied for and granted—court saying at page 992:

> "The immigrant was apparently held or stopped in her passage to this country as a re-

> sult of an anonymous letter written to the authorities, and which had to do with the morality of the immigrant and her relations with one Clarence D. Levy, with whom she had an association on her last visit. However meritorious this claim may have been, it is out of the case now, since the finding, as shown by the return, indicates she is not being held for deportation because of this charge. *I fear that uppermost in the consideration of those who have passed upon the case before has been an influence wielded against the applicant for admission because of her alleged relations with Levy. * * * Innuendo, surmise or guess of immorality will not suffice.*"

In this case, too, it must be apparent to the court that the order was based—*not upon the evidence* but upon mere *suspicion and conjecture,* based upon the Bureau's experience in cases where there was a wide divergence in age.

If the department was anxious to rely on the evidence why did they order a rehearing when a complete and exhaustive hearing had proved the relationship?

Why at the second hearing did they develop seeming discrepancies and then stop short refusing to propound questions calculated to arrive at the whole truth?

Why in the second examining inspector's report (Record, p. 26) and in the two memorandums for the assistant secretary at Washington (Record, pp. 62-3) is such great stress laid on the suspicion of immoral purpose?

Why is the excuse made that "the discrepancies taken singly do not amount to much but collectively do" made?

The answer to these queries is manifest and we submit that it is quite apparent from the face of the record that the order of exclusion involves an abuse of discretion, the denial of a full and fair hearing and is based upon suspicion and conjecture.

We respectfully submit that the order should be reversed and that the writ should issue as prayed.

Dated, San Francisco,
May 7, 1917.

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Attorneys for Appellant.